

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

NORTH COUNTY COMMUNICATIONS)
CORPORATION,)
)
)
 Complainant,)
)
vs.)
)
VERIZON NORTH INC. and VERIZON)
SOUTH, INC.,)
)
 Respondents.)

Docket No. 07-0428

**VERIZON’S RESPONSE TO NCC’S MOTION
TO STRIKE AND DISMISS VERIZON’S AFFIRMATIVE DEFENSES**

Verizon North Inc. and Verizon South Inc. (collectively, “Verizon”), by and through their attorneys, hereby respectfully submit their Response to the motion portion of “North County’s Response to and Motion to Strike and Dismiss Verizon’s Affirmative Defenses” (“NCC’s Motion”) pursuant to the schedule set by the ALJ’s August 30, 2007 Notice. NCC’s Motion is groundless and should be denied.

Introduction

NCC’s Motion, while masquerading as a motion to strike or dismiss Verizon’s affirmative defenses based on ostensible pleading failures, is nothing more than an improper vehicle for prematurely arguing the merits of Verizon’s affirmative defenses. To the extent that NCC’s Motion sets forth any arguments rooted in the applicable pleading requirements for affirmative defenses (rather than based on NCC’s disagreement with the underlying validity of those defenses), the motion is predicated upon an

incomplete recitation of the pleading standard applicable to affirmative defenses in Illinois. NCC claims that “Illinois law requires that ‘[t]he facts constituting any affirmative defense ... must be plainly set forth in the answer or reply,” citing 735 ILCS 5/2-613(d). NCC’s Motion at ¶ 1. NCC truncates the statutory language to serve its purposes. The actual standard is that “the facts constituting any affirmative defense ... ***which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise***, must be plainly set forth in the answer or reply.” 735 ILCS 5/2-613(d) (emphasis added).

All of the necessary facts upon which Verizon’s affirmative defenses are based are expressly stated in Verizon’s Answer, filed jointly with Verizon’s Affirmative Defenses (*see* August 2, 2007 “Verizon’s Answer and Affirmative Defenses”). Parties are not required to restate facts already alleged in the complaint in order to raise an affirmative defense based thereon.¹ *See Fitzpatrick v. City of Chicago*, 131 Ill.App.3d 582, 586 (1st Dist. 1985), *rev’d in part on other grounds*, 112 Ill.2d 211 (1986).

Moreover, the core purpose of Section 2-613(d) is to prevent unfair surprise at trial. *See Salazar v. State Farm Mut. Auto. Ins. Co.*, 191 Ill.App.3d 871, 876 (1st Dist. 1989); *Darwin Co. v. Sweeney*, 110 Ill.App.3d 331, 333 (4th Dist. 1982). Affirmative defenses thus need only provide adequate notice to the other side of the nature of the defense. Verizon’s affirmative defenses are more than sufficient to prevent NCC from unfair surprise at hearing, especially in light of the requirement that pleadings be liberally construed to do substantial justice. *See* 735 ILCS 5/2-603(c). Illinois law recognizes that “[n]o pleading is bad in substance which contains such information as reasonably informs

¹ Nonetheless, Verizon’s Answer fully recites each allegation of the Verified Complaint, followed by Verizon’s answer thereto.

the opposite party of the claim or defense which he or she is called upon to meet.” 735 ILCS 5/2-612(b). NCC’s Motion should be denied.

Discussion

As mentioned above, the bulk of NCC’s Motion consists of improper argument regarding the merits of Verizon’s affirmative defenses. To that end, NCC’s Motion largely repeats the arguments found in “North County’s Opposition to Verizon’s Motion to Dismiss” (“NCC Opposition”), filed August 16, 2007. Likewise, Verizon’s discussion will echo its recent reply to the NCC Opposition, set forth in Verizon’s reply brief in support of its motion to dismiss the Verified Complaint. *See* “Verizon’s Reply in Support of Its Motion to Dismiss,” filed August 23, 2007 (“Verizon’s Reply”).

Verizon addresses each affirmative defense in turn, referring to and incorporating Verizon’s Reply as appropriate.

Affirmative Defense No. 1: Failure to State a Claim

Verizon need not plead any facts to argue that the Verified Complaint fails to state a claim, because the premise of such a defense is that taking all allegations of the complaint as true, without presenting a factual defense, the complaint fails to state a claim. As such, there is no merit to the claim in NCC’s Motion that this affirmative defense is based on a failure to allege facts. As noted above, there is no requirement to restate facts already alleged in the complaint. *See Fitzpatrick, supra*, 131 Ill.App.3d at 586.

NCC does not merely move for dismissal, but instead proceeds to dispute the substantive merit of this affirmative defense, arguing that the Verified Complaint states a cause of action under 220 ILCS 5/13-514. NCC Motion at ¶¶ 5-7. Verizon’s Reply

addressed this issue at length. Rather than repeat those arguments, Verizon incorporates that pleading by reference here for its response to NCC’s arguments. In summary, just as it did in its opposition to the dismissal of the Verified Complaint, NCC improperly seeks to revise the purported “factual” basis for its claims. More specifically, NCC attempts to recharacterize the basis of its Verified Complaint from Verizon’s unwillingness to purchase CNAM/LIDB information for NCC’s customers *directly from NCC, under the specific rates, terms and conditions proposed by NCC*, as alleged in the Verified Complaint, to a broader, blanket “refusal to perform LIDB/CNAM dips of NCC information,” as newly asserted in the NCC Motion. *Compare* Verified Complaint at ¶¶ 19-21 *with* NCC Motion at ¶¶ 6, 11, 16.

This revisionist recasting of NCC’s claims is contradicted on its face by allegations of the Verified Complaint, the Verizon Answer, and the NCC Opposition, all of which state that Verizon already contracts with third parties to obtain “dips,” or queries, of NCC customers’ CNAM/LIDB data. *See, e.g.*, Verified Complaint at ¶¶ 26-28; Verizon Answer at ¶ 24; NCC Opposition at ¶¶ 3, 20, 22. As such, there can be no diminished service, because Verizon has secured arrangements for accessing NCC’s CNAM/LIDB information.

Moreover, the Answer states that Verizon wishes to continue purchasing NCC’s data from third party aggregators. *See* Verizon’s Answer at ¶ 24. Given this, the only way the services about which NCC is ostensibly so concerned about being interrupted – Verizon’s collect or third party billed service to NCC’s customers, and Verizon’s Caller ID service² – would be for NCC to stop selling its CNAM/LIDB data to third parties (a

² NCC does not address that it fails to allege that it offers a service to its customers under which it guarantees delivery of calling name and number information to other providers’ end users’ caller ID units,

decision that lies solely within NCC's discretion), and for Verizon then to decline to purchase that data directly from NCC. Otherwise, Verizon would continue to perform "dips" of NCC's CNAM and LIDB information, and all services would function as they do now.

Verizon's Affirmative Defense No. 1 does not rely on factual allegations independent of the Verified Complaint, and is thus properly pled.

Affirmative Defense No. 2: Federal Preemption

As to Verizon's Affirmative Defense No. 2, NCC claims that Verizon fails to "allege adequate facts to support the affirmative defense or to put NCC on notice as to what Verizon truly intends to argue." Of course, preemption is a legal defense, not a factual one. Moreover, NCC's claims of an inability to understand the predicate for the defense are belied by its argument that the FCC's rulings eliminating the requirement that incumbent local exchange carriers sell their CNAM and LIDB databases to their competitors does not affect NCC's assertion that Verizon can be compelled to buy those databases from NCC. *See* NCC Motion at ¶ 9. The arguments set forth at ¶¶ 8-10 of the NCC Motion underscore that NCC understands exactly the basis of the affirmative defense, which makes explicit reference to the FCC order in which this finding was made (the *Triennial Review Order*³), as well as the federal Telecommunications Act of 1996, the statutory basis for that order.

or a service under which it guarantees the ability to accept third party billed or collect calls. Verizon is unaware of any provider that tariffs such "services."

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004) ("*Triennial Review Order*").

Moreover, the Verified Complaint and Verizon's Answer both set forth factual allegations regarding NCC's CNAM/LIDB data, NCC's desire to compel Verizon to purchase it from NCC, and NCC's assertion that Verizon's decision to decline to purchase it directly from NCC, at the rates proposed by NCC, violates state law. There was no need for Verizon to replead these allegations for a third time in its affirmative defense relating to federal preemption of NCC's claims in this regard. *See Fitzpatrick, supra*, 131 Ill.App.3d at 586. Verizon's Affirmative Defense No. 2 sufficiently apprises NCC of the nature of the defense, and there will be no unfair surprise.

Although this is not the time to argue the merits of the defense, as noted in Verizon's Reply, the Commission was just last year overturned by a federal court after taking a stance – identical to NCC's here – that state law requires more than federal law with respect to unbundling requirements eliminated by the *Triennial Review Order* and the FCC's subsequent order on remand. *See Illinois Bell Telephone Co. v. O'Connell-Diaz et al.*, 2006 U.S. Dist. LEXIS 70221 (N.D. Ill. Sept. 28, 2006). The Seventh Circuit Court of Appeals has repeatedly overturned such utility commission rulings. *See, e.g., Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004) (IURC's order imposing statewide remedy plan outside of the Act's negotiation/arbitration process was preempted by the Act); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) (PSCW's order requiring Wisconsin Bell to file tariffs with price and other terms for interconnection was preempted by the Act); *AT&T Communications of Illinois, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402 (7th Cir. 2003) (Illinois statute dictating method for setting rates for interconnection was preempted by the Act).

Verizon's Affirmative Defense No. 2 is properly pled and presents no unfair surprise to NCC.

Affirmative Defenses No. 3 and 4: Lack of Standing

Significantly, NCC does not assert that Verizon's affirmative defenses relating to NCC's lack of standing to raise claims about the services Verizon provides to its customers lack sufficient factual allegations. Instead, NCC simply disputes the substantive merits of those defenses, which is not appropriate at this stage of the case. However, NCC's arguments demonstrate that the factual predicates to Verizon's affirmative defenses – the allegations of NCC's Verified Complaint pertaining to Verizon customers' caller ID displays and ability to place collect and third-party billed calls to NCC customers (*see* Verified Complaint at ¶¶ 29-30) – are present in the Verified Complaint and Verizon Answer. The affirmative defenses pertaining to NCC's lack of standing to complain of such matters are therefore sufficiently pled.

As to the merits of the defenses, Verizon reiterates that to the extent that NCC customers' information does not show up on Verizon end users' Caller ID units, or to the extent that Verizon end users cannot place collect or third party billed calls to NCC's customers, any standing to raise such claims lies with Verizon and its customers, since it is the performance of Verizon's Caller ID services or alternate billing services that is at issue. NCC's arguments to the contrary are tantamount to claiming that other carriers can raise a claim against Verizon whenever phone service to Verizon's customers is interrupted for whatever reason (for example, last week's massive storm), because the failure of that Verizon service to function prevents other carriers' customers from completing calls to Verizon's customers, therefore impairing the services offered by

those other carriers and those other carriers' revenue streams. This is a ludicrous contention, but is analogous to NCC's claims here. To the extent that anyone has standing to raise claims regarding the services rendered by Verizon to Verizon's customers, it is Verizon, and not NCC.

Verizon's Affirmative Defenses No. 3 and 4 are well-pled, sufficiently put NCC on notice as to the nature of those defenses, and should not be dismissed.

Affirmative Defense No. 5: Mootness

Once again, NCC does not argue that Verizon's Affirmative Defense fails to set forth necessary factual allegations. Instead, as above, NCC demands dismissal simply because it disputes the substantive validity of the defense: "NCC disagrees with Verizon's position in affirmative defense No. 5." *See* NCC's Motion at ¶ 14. In arguing the basis for that disagreement, NCC once again plays fast and loose with the factual allegations of the Verified Complaint, attempting to portray Verizon as "refusing" to query NCC's CNAM and LIDB data (*see* NCC's Motion at ¶¶ 6, 11, 16), when in fact the Verified Complaint confirms that Verizon contracts with third parties to do just that. *See* Verified Complaint at ¶¶ 26-28.

The basis of this affirmative defense is that between the interconnection agreement referenced in ¶ 9 of the Verified Complaint, and the CNAM/LIDB Contract alleged in ¶ 11 thereof, NCC obtains from Verizon all network elements and other facilities necessary for NCC to provide service to its customers. NCC recognizes this (NCC's Motion at ¶ 15), thereby conceding that the facts underlying Verizon's Affirmative Defense No. 5 are sufficiently pled. NCC's disagreement with the validity of the defense is not a basis for its dismissal, and will be addressed on the merits.

Affirmative Defenses No. 6 and 7: NCC's Claims Barred by Contract or Law

Yet again, NCC fails to identify any alleged factual pleading deficiencies in Verizon's affirmative defenses and simply disputes their merits, arguing that the CNAM/LIDB Contract and law which Verizon alleges bar NCC's claims have no bearing on the case. *See* NCC's Motion at ¶¶ 18-19. Verizon disagrees, given that the CNAM/LIDB Contract forms the basis for NCC's discrimination argument (*see* Verified Complaint at ¶¶ 19-21, alleging Verizon will not accept agreement that "mirrors" CNAM/LIDB Contract). Indeed, NCC's entire claim is predicated upon the erroneous notion that there is some basis to compel Verizon to buy NCC's CNAM/LIDB data directly from NCC simply because NCC has contracted to purchase Verizon's CNAM/LIDB for NCC's use. *See generally*, Verified Complaint.

In any event, NCC is obviously sufficiently apprised of the basis of Verizon's defenses and cannot be unfairly surprised by them at trial. NCC will have its opportunity to argue the validity of Verizon's position at a later date, but there are no grounds to strike or dismiss affirmative defenses simply because NCC disagrees with them. Verizon's Affirmative Defenses No. 6 and 7 meet the requisite pleading requirements and should not be dismissed.

Affirmative Defense No. 8: Ripeness

NCC once again fails to identify any pleading failures in this affirmative defense, and instead debates its substantive merit. *See* NCC's Motion at ¶¶ 21-22. The defense is rooted in the pleading failures of the Verified Complaint, and thus requires no further factual predicate. Indeed, the point of the defense is that the Verified Complaint lacks a current factual predicate, as opposed to a highly speculative and hypothetical future one.

Verizon need not debate the substantive merits of the defense at this early stage of the case, but does refer to and incorporate as though fully stated herein the discussion at pages 11-15 of Verizon's Reply, which detail at length why NCC's claims are purely speculative, hypothetical, and therefore not ripe for consideration. Verizon's Affirmative Defense No. 8 is properly pled and should not be dismissed.

Affirmative Defense No. 9: Lack of Commission Jurisdiction

NCC complains that Verizon provides no facts to support the notion that LIDB and CNAM information is an interstate information service. However, the Verified Complaint defines both CNAM and LIDB as databases of customer data (*see* Verified Complaint at ¶¶ 1, 14) and acknowledges that the data must be transmitted over an SS7 signaling network (¶¶ 14(c), (f)). Verizon's affirmative defense alleges that these signaling networks are national in nature. *See* Verizon's Affirmative Defense No. 9. This makes them interstate, not intrastate. Interstate data transmission constitutes an "information service" under federal law. *See* 47 U.S.C. § 153(20).

NCC presents no valid basis for dismissal of this affirmative defense.

Affirmative Defense No. 10: NCC's Claims Violate the Illinois Public Utilities Act

Once again, NCC fails to identify any factual deficiencies in Verizon's pleading of the affirmative defense. Instead, NCC simply registers its disagreement with the substance of the defense and argues for its dismissal on that basis. *See* NCC's Motion at ¶¶ 24-25. NCC's opportunity to respond substantively will come in due course. For now, NCC is fully aware of the basis of this defense, and there are no facts not expressly stated that would surprise NCC at hearing, since the existence of the Verified Complaint and NCC's request for relief thereunder form the basis of this defense. *See* Verizon's

Affirmative Defense No. 10 (“NCC’s attempt to compel Verizon, through the Verified Complaint, to purchase NCC’s CNAM and LIDB data directly from NCC, and NCC’s refusal to permit Verizon to purchase NCC’s CNAM and LIDB data from third party providers who collect and aggregate such data, violate the Illinois Public Utilities Act”

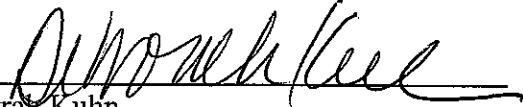
Verizon’s Affirmative Defense No. 10 is properly pled and should not be dismissed.

Conclusion

At its core, NCC’s Motion is not a serious request for dismissal of Verizon’s affirmative defenses based on pleading failures. It is instead an improper and premature effort to dispute the substantive merits of those defenses, prior to discovery, testimony or hearing. Verizon’s affirmative defenses meet the pleading standard set forth in 735 ILCS 5/2-613(d), which requires only that “the facts constituting any affirmative defense ... which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.” This is so notwithstanding NCC’s disagreement with the substance of Verizon’s affirmative defenses. Verizon’s affirmative defenses are more than sufficient to prevent NCC from unfair surprise at hearing, particularly given the requirement that pleadings be liberally construed to do substantial justice. *See* 735 ILCS 5/2-603(c). NCC’s Motion should be denied.

Dated: September 7, 2007

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Complainant,

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SOUTH, INC.**

Respondents

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NOTICE OF FILING

Please take notice that on September 7, 2007, I caused the foregoing "Verizon's Response to North County's Motion to Strike and Dismiss Verizon's Affirmative Defenses" in the above-captioned matter to be filed electronically with the Illinois Commerce Commission via its E-Docket system.


Deborah Kuhn

CERTIFICATE OF SERVICE

I, Deborah Kuhn, certify that I caused the foregoing "Verizon's Response to North County's Motion to Strike and Dismiss Verizon's Affirmative Defenses," together with a Notice of Filing, to be served upon all parties on the attached service list on this 7th day of September, 2007, by electronic mail or by U.S. Mail, as noted.


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